UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

EMILIO CACHO-TORRES,

Plaintiff,

v.

CHRISTIAN MIRANDA-LOPEZ; JOSE L. RODRIGUEZ-ORTIZ; JOHN DOE AND RICHARD ROE, all in their Official and Personal Capacities as Police Officers and as Representatives of the Conjugal Partnerships that they Comprise,

Defendants.

Civil No. 05-1825 (JAG/JAF)

OPINION AND ORDER

Pending before the court is Defendants' Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6)("Defendants' Motion") and Plaintiff's Opposition thereto (Plaintiff's Opposition"). Docket Nos. 39 and 54. The claims under consideration are brought by Plaintiff, Emilio Cacho-Torres ("Torres"), under Sections 1983 and 1988 of the Civil Rights Act of 1964, 42 U.S.C. §§ 1983 and 1988, the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution, and Article II, Sections 7, 8 and 10 of the Constitution of the Commonwealth of Puerto Rico, against two officers of the Puerto Rico Police Department ("PRPD"), Christian Miranda-López ("Miranda"), José L. Rodríguez-Ortiz ("Rodríguez"), an unknown officer of the Puerto Rico National Guard ("John Doe guardsman"), unknown supervisors of Co-defendants ("Richard Roe"), and other

unknown officials ("John Doe"). Having thoroughly reviewed the filings, and applicable law, Defendants' Motion is hereby **GRANTED in part** and **DENIED in part.**

I.

Factual Background

The following relevant facts are alleged in Plaintiff's Amended Complaint and taken as true for the purpose of resolving Defendants' Motion. During the early afternoon on August 6, 2004, Plaintiff Torres was consuming a few beers in a business at Avenida R. H. Todd, in Santurce, Puerto Rico, when a group of students began bothering him and shouting at him. Torres was scolding the students as Co-defendants Miranda and Rodríguez arrived in their police vehicle accompanied by John Doe guardsman.

Co-defendants Miranda and Rodríguez intervened and questioned Plaintiff Torres regarding the incident. Torres informed Co-defendants Miranda and Rodríguez that he was calm and was going to the bus stop to return home. In response, Co-defendants Miranda and Rodríguez pushed Torres to the bus stop and struck him, causing him to fall. Miranda and Rodríguez put Torres face down, "struck him again, kicked him and hit him with the butt of a weapon." Docket No. 34, ¶ 15. John Doe guardsman witnessed these events, but did not intervene. Co-Defendants Miranda and Rodríguez placed Torres in their squad car, transported him to Precinct 266 at Calle Hoare, in Santurce, and placed him in a cell. Co-defendants Miranda and

Rodríguez left Plaintiff handcuffed in the cell for several hours, during which time, at some point, they beat him again.

Later the same evening, Co-defendants Miranda and Rodríguez informed Torres' mother at her residence that Torres was being detained at the precinct, after being found drunk and disturbing the peace. Miranda and Rodríguez also informed Torres' mother that Plaintiff had fallen and that someone could come to the precinct to pick him up. Torres' brother went to the precinct, where he found Torres handcuffed and wet in a cell, having defecated on himself, and bleeding from the head. Miranda and Rodríguez informed Torres' brother that Torres had been hitting himself in the cell. None of Torres' injuries were self-inflicted.

Either Co-defendant Miranda or Rodríguez informed Torres' brother that the officers would be giving Plaintiff "a break" and not filing charges, since his parents were elderly and his father was ill. Torres was limping on the way home and upon arriving home, he fell. An ambulance transported Torres to the CDT at Calle Hoare, where CDT representatives informed Torres' family that he was inebriated. Torres remained at the CDT over night. The next day, on August 7, 2004, CDT representatives informed Torres' brother that nothing was wrong with Torres. When Torres left the CDT dispensary, he could not walk.

On August 9, 2004, Plaintiff Torres was taken to Hospital Pavía, in Hato Rey, Puerto Rico, to receive a CT scan. The CT scan indicated that Torres had a clot in his brain.

On August 20, 2004, at Puerto Rico's Centro Médico, Torres underwent an operation to have the blood clot removed. Torres' attending physicians indicated that he did not have any condition, such has high blood pressure, that would provoke spontaneous cranial bleeding.

After his operation, Torres spent thirty days at Heath South at the University Hospital. Since that time, Torres has been totally disabled, unable to work or lead a normal life, and receiving ambulatory care (medical care provided on an outpatient basis).

II.

Procedural Background

The pending motion is the second motion filed by Defendants pursuant to Fed. R. Civ. P. 12(b)(6). On August 10, 2007, the United States Court of Appeals for the First Circuit vacated this court's judgment entered in favor of Defendants on Defendants' first motion to dismiss. The Court of Appeals remanded the case with instructions to allow for the filing of an amended complaint consistent with "the new gloss on notice pleading" in Bell Atl. Corp. v. Twombly.[1] 550

[1] Twombly abrogated the standard for notice pleading established in Conley v. Gibson. Conley, 355 U.S. 41 (1957). In Conley, Justice Black makes reference to "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that

U.S. 544, 562-63 (2007); Docket Nos. 11, 15 and 24. Approximately eight months later, on April 1, 2008, Plaintiff filed his Amended Complaint. Docket No. 34. On May 6, 2008, Defendants filed the pending motion to dismiss. Defendants' Motion raises the following grounds for dismissal: (1) Plaintiff's Section 1983 official-capacity claims are barred by the Eleventh Amendment; (2) Plaintiff fails to state a Section 1983 claim for which relief can be granted; (3) Defendants are entitled to qualified immunity; and (4) in the absence of any actionable federal claim, the court should dismiss Plaintiff's supplemental claims. Docket No. 39.

The court has generously granted Plaintiff numerous extensions of time to file his response. See Docket Nos. 43, 46, 47, 48, 49, 53. Plaintiff failed to file his response by the first extended deadline of June 12, 2008. Docket No. 43. Due to a subsequent change in Plaintiff's counsel, the court deemed Defendants' Motion submitted on November 13, 2008, after which Plaintiff did not file a response. Docket No. 46. On the entry of new counsel for Plaintiff, the court again extended the deadline for filing of Plaintiff's response to

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the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46 (emphasis supplied). Twombly recognized that this language may leave courts with the impression that "a wholly conclusory statement of claim" would survive a motion to dismiss "whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." 550 U.S. at 561. Twombly clarifies that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Twombly, 550 U.S. at 563 (emphasis supplied).

March 26, 2008. Docket Nos. 47, 48 and 49. In lieu of a response, on March 26, 2008, plaintiff filed a motion for leave to file a second amended complaint, which we denied, and a motion to hold his response in abeyance, which we granted. Docket Nos. 50, 51, and 53. On March 31, 2009, Plaintiff filed his response to Defendants' Motion. Docket No. 54.

III.

Analysis

A. Standard of Judicial Review

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an action against him based solely on the pleadings for the plaintiff's "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Our standard of review for dismissal pursuant to Rule 12(b)(6) is well-established. In assessing a motion to dismiss, "we accept as true the factual averments of the complaint and draw all reasonable inferences therefrom in the plaintiffs' favor." Educadores Puertorriqueños en Acción v. Hernández, 367 F.3d 61, 62 (1st Cir. 2004) (citing LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998)); see Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962, 971 (1st Cir. 1993). We then determine whether the plaintiff has stated a claim under which relief can be granted.

We note that a plaintiff must only satisfy the simple pleading requirements of Federal Rule of Civil Procedure 8(a) in order to

survive a motion to dismiss. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-14 (2002); DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 55 (1st Cir. 1999). A plaintiff must merely set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed.R.Civ.P. 8(a)(2), and need only give the respondent fair notice of the nature of the claim and petitioner's basis for it. Swierkiewicz, 534 U.S. at 512. "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Id. at 514 (emphasis supplied) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). Simply put, Plaintiff's well-pleaded facts "must 'possess enough heft' to set forth 'a plausible entitlement to relief.'" Gagliardi, 513 F.3d 301, 305 (1st Cir. 2008) (quoting Twombly, 550 U.S. at 557-59).

B. Eleventh Amendment Immunity

The Eleventh Amendment to the U.S. Constitution provides that the judicial power of the United States does not extend to any suit in law or equity against a state by a citizen of another state or by foreign citizens. U.S. CONST. Amend. XI. Eleventh Amendment immunity is interpreted by the United States Supreme Court to extend to suits against a state by its own citizens, like the present suit. Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 446 (2004) ("Although the text . . . refers only to suits against a State by citizens of

another State, we have repeatedly held that an unconsenting State also is immune from suits by its own citizens."). It is well-settled that the Commonwealth of Puerto Rico is protected from suit by the Eleventh Amendment to the same extent as the states. Torres-Alamo v. Puerto Rico, 502 F.3d 20, 24 (1st Cir. 2007) ("'Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects.'") (quoting Ramirez v. P.R. Fire Serv., 715 F.2d 694, 697 (1st Cir. 1983)); Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 34 (1st Cir. 2006).

Puerto Rico's officials share in the Commonwealth's Eleventh Amendment immunity since a suit against one of its officials in their official capacity is, in effect, a suit against the Commonwealth. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather a suit against the official's office."); Negron-Almeda v. Santiago, 528 F.3d 15, 21 n.2 (1st Cir. 2008) ("Claims against a state official are treated as claims against the state."). Notably, the Eleventh Amendment does not bar suits in federal court against state officers for prospective declaratory or injunctive relief. Ex Parte Young, 209 U.S. 123, 155-56 (1908) (finding that officers of the state engaged in unconstitutional acts in the exercise of their duties could be enjoined by a federal court of equity); Asociacion de Subscripcion Conjunta del Seguro de Responsibilidad Obligatorio v. Flores, 484 F.3d 1, 24-25 (1st Cir.

2007); Nieves-Márquez v. Commonwealth of Puerto Rico, 353 F.3d 108, 123 (1st Cir. 2003). The "Ex Parte Young exception" is available "where a plaintiff alleges an ongoing violation of federal law, and where the relief sought is prospective rather than retrospective." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 294 (1997) (O'Connor, J., concurring in part and concurring in the judgment). Such prospective declaratory and injunctive relief is not available where plaintiffs allege violations of state law by state officials in federal court. Diaz-Fonseca, 451 F.3d at 42-43 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.") (quoting Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1994)).

The Eleventh Amendment's broad grant of immunity serves to protect the Commonwealth's treasury and dignity interest in being haled into federal court. Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 30-31 (1994) (holding that bi-state railway authority was not immune from suit because suit did not implicate states' dignity interest or financial solvency); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."); Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. and the Caribbean Cardiovascular Ctr Corp., 322 F.3d 56, 63 (1st Cir. 2003), cert.

denied, 540 U.S. 878; E.E.O.C. v. Commonwealth of Puerto Rico, 451 F. Supp. 2d 296, 300-01 (D.P.R. 2006). Notwithstanding this purpose, there are two clear exceptions to the Eleventh Amendment's grant of immunity. First, Congress may abrogate a state's immunity pursuant to a valid exercise of power. Maysonet-Robles v. Cabrero, 323 F.3d 43, 49 (1st Cir. 2003). Second, a state may waive its sovereign immunity by consenting to federal court jurisdiction. Id.

Eleventh Amendment immunity extends to any entity that is an "alter-ego" or "arm" of the state. Wojcik v. Massachusetts State Lottery, 300 F.3d 92, 99 (1st Cir. 2002) (holding a state lottery commission to be an "arm of the state" and, thus, immune from suit under the Eleventh Amendment); Culebras Enters. Corp. v. Rios, 813 F.2d 506 (1st Cir. 1987) (holding that the Puerto Rico Conservation Authority is the "alter ego" of the Commonwealth and, therefore, immune from suit in federal court). The question of whether an entity is an "alter-ego" or "arm" of the state is an issue of federal law requiring a two-step analysis. Hess, 513 U.S. at 43-44; Fresenius, 322 F.3d at 61, 65; Breneman v. U.S. ex rel. F.A.A., 381 F.3d 33, 39 (1st Cir. 2004) (relying on the two-step analysis employed in Hess and Fresenius). First, a court must determine whether a state has indicated an intention, "either explicitly by statute or implicitly through the entity's structure," that the entity share in the state's Eleventh Amendment immunity. Redondo Const. Corp. v. Puerto Rico Highway and Transp. Authority, 357 F.3d 124, 126 (1st Cir. 2004)

(citing Hess and Fresenius); see Hess, 513 U.S. at 43-44; Fresenius, 322 F.3d at 65 (holding that the two-part analysis in Hess, having refined the analysis employed in Metcalf & Eddy v. Puerto Rico Aqueduct and Sewer Auth., 993 F.2d 935 (1st Cir. 2003), governs a determination as to whether an entity is an arm of the state). The structural "indicators of immunity," or lack thereof, that must be evaluated include: (1) the "extent of state control included through the appointment of board members," if any, and the "state's power to veto board actions;" (2) "how the enabling and implementing legislation characterized the entity and how the state courts have viewed the entity;" (3) "whether the entity's functions are readily classifiable as state functions or local or non-governmental functions;" and (4) "whether the state bore legal liability for the entity's debts." Fresenius, 322 F.3d at 68 (citing Hess, 513 U.S. at 44-46 for the above four factors).

If the above-listed indicators point markedly in one direction, the court's analysis ends. If the indicators point in different directions, then the dispositive question becomes whether an adverse judgment would pose a threat to the state's treasury. Fresenius, 322 F.3d at 68 (this analysis focuses on whether the state has legally or practically obligated itself to pay the entity's indebtedness); Hess, 513 U.S. at 49 ("The 'vast majority of Circuits . . . have concluded that the state treasury factor is the most important factor

to be considered . . . and, in practice have generally accorded this factor dispositive weight.'") (citing briefs).

We now turn to whether the PRPD or the PRNG is an arm of the Commonwealth of Puerto Rico, entitling it and its officials to Eleventh Amendment immunity. This court has routinely held that the PRPD is an arm of the Commonwealth that enjoys Eleventh Amendment immunity. See Crispin-Taveras v. Municipality of Carolina, 2009 WL 349751, at *3 (D.P.R. Feb. 10, 2009); Nieves v. Comm. of P.R., 425 F. Supp. 2d 188, 192 (D.P.R. 2006); López-Rosario v. Police Dept., 126 F. Supp. 2d 167, 170-71 (D.P.R. 2000); Aquilar v. Comm. of P.R., 2006 WL 3000765, at *1 (Oct. 19, 2006); Suárez-Cesetero v. Pagán-Rosa, 996 F. Supp. 133, 142-43 (D.P.R. 1998). As further explained below, we see no reason here to part ways with these cases.

On at least two occasions, this court has dismissed claims brought against the Puerto Rico National Guard or its officers, in their official capacities, as barred by the Eleventh Amendment. Roig v. Puerto Rico National Guard, 47 F. Supp. 2d 216 (D.P.R. 1999) (citing Ursulich v. Puerto Rico National Guard, 384 F. Supp. 736 (D.P.R. 1974)("A § 1983 suit against the Puerto Rico National Guard and its officers in their official capacities is essentially a suit against the Commonwealth of Puerto Rico."). Chief Judge Toledo, in Ursulich, first considered the issue. Ursulich found two factors dispositive in determining that the Puerto Rico National Guard should share in the Commonwealth's Eleventh Amendment immunity: the PRNG's

lack of power to sue or be sued[2] and the fact that if a judgment would be rendered against the PRNG, it would be paid from the Commonwealth's treasury. Ursulich, 384 F. Supp. at 738 (D.P.R. 1974) (relying on factors enumerated in Canadian Transport Co. v. Puerto Rico Ports Authority, 333 F. Supp. 1295 (1971)). Although "indicators of immunity" have evolved since Ursulich, we reach the same conclusion today under the more recent Fresenius. We note in regard to indicators one through four above that the PRNG: (1) is commanded by the Governor of Puerto Rico, 25 LPRA §§ 2051, 2055, 2057 and 2058; (2) is characterized in its enabling act as a part of the Military Forces of Puerto Rico, included for funding purposes in the general budget of the Government of Puerto Rico, 25 LPRA §§ 2051, 2092; (3) serves a governmental, non-proprietary function, see, e.g., 25 LPRA § 2058(b) (authorizing service when the "public safety requires it"); and most importantly, (4) would not be able to independently satisfy adverse judgments against it or its officers without assistance from the public treasury, 25 LPRA §§ 2051 et seq. We find that the indicators point markedly in one direction — towards immunity.

While Plaintiff's Amended Complaint requests equitable relief in the form of a declaratory judgment, we do not find such relief to be

[2]Contrary to Ursulich, 384 F.Supp. at 738, and without citation to authority, Plaintiff asserts that the National Guard "has the ability to sue and be sued in its own name." Docket No. 54 ¶ 46.

"prospective" in the sense that, if granted, it would remedy an ongoing constitutional violation. The Ex Parte Young exception, therefore, does not apply.

Plaintiff offers valid, but readily distinguishable, authority to support his position that the PRPD and PRNG (and their officials) waived any right to Eleventh Amendment immunity. First, Plaintiff argues that the PRPD and PRNG waived any Eleventh Amendment immunity as a precondition to the receipt of federal funds. Docket No. 54 ¶¶ 42, 43. Indeed, the waiver of Eleventh Amendment immunity may be made a condition to a state's receipt of federal funding or participation in a federal program. See Vives v. Rey, 310 F. Supp. 2d 402 (D.P.R. 2004); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985), superceded by statute as stated in Vives, supra; A.W. v. Jersey City Public Schools, 341 F.3d 234, 242 (3rd Cir. 2003) (holding that Section 1403 of the Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq., "constitutes a clear statement of Congress' intent to condition the receipt of federal IDEA funds on a state's waiver of Eleventh Amendment immunity."). But, notably, such a waiver must be "stated by the most expressive language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." Vives, 310 F. Supp. 2d at 404. Simply put, congressional intent must be "unequivocal." Atascadero State Hosp., 473 U.S. at 246. By way of example, in Vives, this court held that the Commonwealth waived any Eleventh Amendment

immunity to a student's Rehabilitation Act claim under language in the Act that provides: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." 310 F. Supp. 2d at 404 (citing 42 U.S.C.A. § 2000d-7).[3] Noticeably absent here in Plaintiff's Opposition is any reference at all to a provision of federal law that we might construe to be a waiver of Eleventh Amendment immunity by the PRPD or PRPD.

Second, Plaintiff argues that the PRPD and PRNG waived any right to Eleventh Amendment immunity upon the acceptance of federal funding. Docket No. 54, ¶ 46. We disagree. A state does not automatically forfeit Eleventh Amendment immunity through participation in a federal program that provides federal funds for state operated systems of public aid. Atascaero State Hosp., 473 U.S. 234, 246-47; Edelman v. Jordan, 415 U.S. 651, 673; (1974); see 3 LPRA § 2501(c) (including the PRNG and PRPD in the category of "public safety agencies and programs"). As such, Plaintiff's claimed "multi million dollar participation in federal grants and monies by the Commonwealth of Puerto Rico, its Police Department and the National Guard" has no bearing on the issue of waiver. Docket No. 54, ¶ 43.

[3]Curiously, Atascadero and Lane v. Pena, 518 U.S. 187 (1996), relied on by Plaintiff, concern claims brought under the Rehabilitation Act prior to Congress' incorporation of an express "waiver" in Section 2000d-7 of the Act.

Third, Plaintiff argues that Defendants waived any Eleventh Amendment immunity through their conduct in litigation, either by filing an answer or counterclaim or making a general appearance. Docket No. 54, ¶ 44. Plaintiff further states that Defendants "have submitted themselves voluntarily to the jurisdiction of the Court, when they voluntarily invoked the jurisdiction of the federal court and made a 'clear declaration'" to that effect. Docket No. 54, ¶ 45. A state entity may, through certain affirmative conduct in litigation or an express declaration, waive its right to assert Eleventh Amendment immunity from suit in federal court. Diaz-Fonseca, 451 F.3d at 33; see, e.g., Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, 622 (2002) (holding that state defendant waived its right to assert immunity by removing the suit from state to federal court); Clark v. Barnard, 108 U.S. 436, 447-48 (1883) (holding that state waived right to immunity when it intervened as a claimant); Skelton v. Henry, 390 F.3d 614, 618-19 (8th Cir. 2004) (holding that the state did not waive Eleventh Amendment immunity by asserting a counterclaim and third-party claim when it also raised the immunity defense in its answer with which it asserted those claims). Having carefully reviewed the docket, we find no "declaration" or any conduct whatsoever on the part of Co-defendants that might be construed as a voluntary waiver of their Eleventh Amendment immunity. Defendants' activity to date is limited to two motions to dismiss, both of which raise Eleventh Amendment immunity.

Docket Nos. 11 and 39. To the contrary, Defendants are by no means willingly before this court. Finding no waiver, Plaintiff's Section 1983 claims against Co-defendants Miranda, Rodríguez, John Doe guardsman, their unknown supervisors ("Richard Roe"), and other unknown officials ("John Doe"), all in their official capacities, are hereby **DISMISSED WITH PREJUDICE.**[4]

C. Plaintiff's Section 1983[5] Claims for Violation of the Fourth, Fifth, and Fourteenth Amendments

Co-Defendants argue that Plaintiff fails to state a Section 1983 claim for violation of the Fourth, Fifth, and Fourteenth Amendments. Docket No. 39. The essential elements of claim brought under Section 1983 of the Civil Rights Act are: (1) conduct committed by a person acting under color of state law, (2) that deprived plaintiff(s) of rights, privileges or immunities secured by the Constitution or laws of the United States. Parrat v. Taylor, 451 U.S. 527 (1981), overruled on other grounds, Hudson v. Palmer, 468 U.S. 527 (1984); Rodriguez-Cirillo v. Garcia, 115 F.3d 50, 52 (1st Cir. 1997) (citing

[4]Plaintiff's second cause of action is brought against José *sic* [Pedro] Toledo-Dávila ("Dávila"), Superintendent of the Puerto Rico Police Department, a person who is not a named defendant in this case. That fact alone makes any attempt to plead a claim against Dávila futile.

[5]Section 1983 of Title 42 of the United States Code reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States of other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

Martinez v. Colón, 54 F.3d 980, 984 (1st Cir. 1995)); Voutour v. Vitale, 761 F.2d 812, 819 (1st Cir. 1985). The second element requires a causal connection between the alleged conduct of a defendant and deprivation of a federally-protected right. Rodriguez, 115 F.3 at 52 (citing Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 559 (1st Cir. 1989)) (emphasis supplied); Wilson v. City of North Little Rock, 801 F.2d 316, 322 (8th Cir. 1986); Coon v. Ledbetter, 780 F.2d 1158, 1161 (5th Cir. 1986). Consequently, a supervisor's liability under Section 1983 "cannot be predicated on a respondeat superior theory . . . but only on the basis of [the supervisor's] own acts or omissions." Seekamp v. Michaud, 109 F.3d 802, 808 (1st Cir. 1997) (citing Sanchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996). A supervisor can only be held liable for the violation of a federal right under Section 1983 if (1) the behavior of his or her subordinate results in the violation, and (2) the supervisor's action or inaction is "affirmatively linked" to the subordinate's conduct such that it could be characterized as "supervisory encouragement, condonation, or acquiescence" or "gross negligence amounting to deliberate indifference." Id. An important factor to consider in determining supervisory liability for a Section 1983 claim is whether a supervisor was put on some kind of notice of the violation. Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988)("[O]ne cannot make a 'deliberate' or 'conscious' choice to act or not to act

unless confronted with a problem that requires the taking of affirmative steps.").

Liability under Section 1983 may be imposed for a failure to act that deprives a person of his or her constitutional right, but only when there is a duty to act to prevent the deprivation. Clark v. Taylor, 710 F.2d 4, 10 (1st Cir. 1983) ("Even absent supervisory authority, however, a party's position of responsibility may impose on him a duty to intervene to prevent a constitutional violation."). We now consider whether the facts plead by Plaintiff state a plausible entitlement to relief under Section 1983 for violation of the Fourth, Fifth and Fourteenth Amendments.

1. Fourth Amendment

a. Use of Excessive Force

The Fourth Amendment, through the Fourteenth Amendment,[6] protects individuals against unreasonable searches and seizures by the state. U.S. CONST. AMEND. IV ("[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause . . . ."); see United States v. Price, 383 U.S. 787 n.7 (1966); Yeo v. Town of Lexington, 131 F.3d 241, 249 n.3 (1st Cir. 1997)(en banc), cert. denied, 525 U.S. 904 (1998);

[6]The Fourth Amendment's prohibition against unreasonable seizures has been made applicable to the states by the Fourteenth Amendment. See Martinez-Rivera v. Sanchez Ramos, 498 F.3d 3, 7 n.4; Maryland v. Pringle, 540 U.S. 366 (2003).

United States v. Lopez, 989 F.2d 24, 26 (1st Cir. 1993). A seizure occurs when an officer, "by means of physical force or other show of authority, restrains the liberty of a citizen" and the person submits to the restriction under a reasonable belief that he or she "would have believed that he or she was not free to leave." United States v. Sealey, 30 F.3d 7, 9 (1st Cir. 1994); United States v. Holloway, 499 F.3d 114, 117 (1st Cir. 2007) (quoting Sealey). The question of whether a seizure is reasonable depends on the situation and requires a "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

Plaintiff's Amended Complaint alleges that all known and unknown defendants violated Plaintiff's civil rights under the Fourth Amendment through "police brutality" and "use of excessive force" while acting under "color of law." Docket No. 34, ¶¶ 1, 4-8. We may reasonably infer that the alleged "excessive force" and "police brutality" refers to the beating of Plaintiff by Co-defendants Rodríguez and Miranda at the bus stop and during his detention in a cell. Docket No. 34, ¶¶ 15 and 18. Plaintiff's Amended Complaint does not state that John Doe guardsman actually hit Plaintiff or for what purpose or in precisely what capacity John Doe guardsman was patrolling with Co-defendants Miranda and Rodríguez. It is, therefore, not clear as to whether John Doe guardsman actually had a duty to act to prevent physical abuse and deprivation of

Plaintiff's Fourth Amendment right. Plaintiff's Amended Complaint does allege, however, that John Doe guardsman was present at the bus stop and failed to intervene to protect Plaintiff from Co-defendants Miranda and Rodríguez while acting under color of state law, which in turn contributed to Plaintiff's injuries. Taken as true, we find that these allegations state a plausible entitlement to relief under the Fourth Amendment against Co-defendants Miranda, Rodríguez, and John Doe Guardsman. Accordingly, Defendants' Motion for failure to state a Section 1983 claim against Co-defendants Rodríguez, Miranda, and John Doe guardsman in their official and personal capacities for excessive use of force is **DENIED.**

Plaintiff's Section 1983 claims against unknown supervisors ("Richard Roe"), are expressly premised on a theory of "supervisory liability," Docket No. 34, ¶ 8. Plaintiff's Amended Complaint is void of any factual allegations affirmatively linking the conduct of unknown supervisors to that of their subordinate officers. Absent an alleged "causal connection" to the claimed unconstitutional seizure, Plaintiff's Amended Complaint fails to state a plausible entitlement to relief under the Fourth Amendment against unknown supervisors ("Richard Roe"). Accordingly, Defendants' Section 1983 claims against unknown supervisors ("Richard Roe"), in their official and personal capacities, for the excessive use of force are **DISMISSED WITH PREJUDICE.**

b. Malicious Prosecution

Defendants argue that Plaintiff fails to state a claim under Section 1983 for malicious prosecution "in light of the fact that no criminal action was initiated or instigated by appearing defendants." Docket No. 39, at 13. Defendants' argument is well-taken. The First Circuit has "assume[d] without deciding that malicious prosecution can, under some circumstances, embody a violation of the Fourth Amendment and thus ground a cause of action under section 1983." Nieves v. McSweeney, 241 F.3d 46, 54 (1st Cir. 2001) (quoting Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 256 (1st Cir. 1996); Albright v. Oliver, 510 U.S. 266, 275-76 (1994) (acknowledging that an alleged deprivation of one's right to be free from prosecution without probable cause might be judged under the Fourth Amendment).[7] The First Circuit requires that the alleged malicious prosecution result in a deprivation of liberty "consistent with the concept of [a] seizure." Britton v. Maloney, 196 F.3d 24, 28 (1st Cir. 1999). And, inherent in the term "prosecution," is a requirement that the "unreasonable seizure" result pursuant to some "legal process." Heck v. Humphrey, 512 U.S. 477, 484 (1994) (stating that the common law cause of action for malicious prosecution "permits damages for confinement imposed pursuant to some legal process"); Calero-Colon,

[7] There would appear to be a divergence of opinion among the circuits as to what extent a claim of malicious prosecution is actionable under Section 1983 for violation of rights secured by the Fourth Amendment. See Albright, 510 U.S. at 271 n.4.

68 F.3d 1, 3 (1st Cir. 1995) ("the tort of malicious prosecution contemplates general damages as well as compensation for any arrest and imprisonment preceding the termination of the criminal proceeding"); McSweeney, 241 F.3d 46 ("[T]he offending legal process comes either in the form of an arrest warrant (in which case the arrest would constitute the seizure) or a subsequent charging document (in which case the sum of post-arraignment deprivations would comprise the seizure)."). In line with the above authority are the elements of a claim for malicious prosecution under Puerto Rico common law, which require a showing that: (1) a criminal action was initiated and instigated by defendants; (2) a criminal action terminated in favor of plaintiff; and (3) the defendants acted with malice and without probable cause; and (4) plaintiff suffered damages. Torres v. Superintendent of Police of Puerto Rico, 893 F.2d 404, 409 n.7 (1st Cir. 1990); Rodriguez-Esteras v. Solivan-Diaz, 266 F. Supp. 2d 270 (D.P.R. 2003).

As noted above, Plaintiff's Amended Complaint alleges that an unconstitutional seizure occurred. Noticeably absent from Plaintiff's Amended Complaint, however, is any allegation that such actions were carried out pursuant to some legal process, such as an arrest warrant or criminal proceeding that terminated in favor of Plaintiff. Furthermore, Plaintiff acknowledges, but does not challenge, the stated cause for his detention, i.e., being drunk and disturbing the peace. We find that the allegations in Plaintiff's Amended Complaint

fail to state a plausible entitlement to relief under the Fourth Amendment for malicious prosecution against any known or unknown Defendant. Accordingly, Plaintiff's Section 1983 claims against all known and unknown Defendants, in their personal and official capacities, for malicious prosecution, are **DISMISSED WITH PREJUDICE.**

2. Fourteenth Amendment

Plaintiff's Section 1983 claim is brought, in part, on a claimed Fourteenth Amendment deprivation. Docket No. 34 ¶ 1; U.S. CONST. AMEND. XIV, § 1 (providing that no State shall "deprive any person of life, liberty, or property, without due process of law"). Neither Plaintiff's Amended Complaint nor his Opposition identify specifically what deprivations Plaintiff allegedly suffered. We glean from Plaintiff's allegations of "police brutality" and "excessive force," Docket No. 34 ¶¶ 1, 43, and 45, that Plaintiff alleges an unconstitutional deprivation of liberty without due process of law in violation of the Fourteenth Amendment. Plaintiff's Section 1983 claim is not properly based on a due process violation.

In Graham v. Conner, Chief Justice Rehnquist held that "*all* claims" against law enforcement officers for "excessive force-deadly or not in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen" should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source

of constitutional protection against this sort of physically-intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."). Since Graham, the First Circuit Court of Appeals and this court have declined to recognize Section 1983 claims based on an alleged deprivation of substantive due process rights in violation of the Fourteenth Amendment. Estate of Bennett v. Wainwright, 548 F.3d 155 (1st Cir. 2008) ("dismissing substantive due process claim premised on deprivation of life interest because claim was an excessive force claim more appropriately brought under the Fourth Amendment); Torres-Rivera v. O'Neill-Cancel, 406 F.3d 43, 51-53 (1st Cir. 2005) (holding that an excessive-use of force claim is governed by the "objectively reasonable" standard applicable to Fourth Amendment claims, rather than the "shock the conscience' standard applicable to substantive due process claims under the Fourteenth Amendment); Marrero-Rosado ex rel. JLSM v. Cartagena, 2009 WL 890473, at *9 (D.P.R. March 27, 2009) (declining to review a Section 1983 claim brought against police officers for alleged use of excessive force as a "due process" violation).

A Section 1983 claim for malicious prosecution in violation of a Plaintiff's due process rights under the Fourteenth Amendment is also not actionable, to the extent Plaintiff attempts to plead such a claim here. The First Circuit has declared that: (1) "[t]here is no substantive due process right under the Fourteenth Amendment to

be free from malicious prosecution," Roche v. John Hancock Mutual Life Ins., 81 F.3d at 249, 256 (1st Cir. 1996) (citing Albright v. Oliver, 510 U.S. 266, 271 (1994); and (2) because Puerto Rico law provides an adequate remedy for malicious prosecution, plaintiffs may not also bring a procedural due process claim for malicious prosecution under Section 1983. Torres v. Supertendent of Police of Puerto Rico, 893 F.2d 404, 410-11 (1st Cir. 1990)(citing Barnier v. Szentmiklosi, 810 F.2d 594, 600 (6th Cir. 1987).

There would appear to be no legal basis for Plaintiff's Section 1983 claims against Defendants for deprivation of Plaintiff's due process rights under the Fourteenth Amendment. Accordingly, Plaintiff's Section 1983 claims brought against all known and unknown Defendants for deprivations of due process are hereby **DISMISSED WITH PREJUDICE.**

3. Fifth Amendment

Plaintiff's Section 1983 claims against Co-defendants for violation of his due process rights under the Fifth Amendment fail for two reasons. First, as explained above, Plaintiff's claims based on the alleged use of excessive force and police brutality are properly analyzed under the Fourth Amendment. Second, the Fifth Amendment due process clause applies only "to actions of the federal government" rather than those of the state. Dusenbery v. United States, 534 U.S. 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process

Clause of the Fourteenth Amendment prohibits the States from depriving any person of property without 'due process of law.'"); Lee v. City of Los Angeles, 250 F.3d 668, 687 (9th Cir. 2001). Plaintiff does not allege unconstitutional conduct on the part of a federal actor. Accordingly, Plaintiff's Section 1983 claims against Defendants in their personal capacities for an alleged deprivation of due process under the Fifth Amendment are hereby **DISMISSED WITH PREJUDICE.**

D. Qualified Immunity

Defendants assert that they are entitled to qualified immunity from liability for Plaintiff's Section 1983 claims. Docket No. 39, at 13-16. Under the doctrine of qualified immunity, government officials performing discretionary functions are shielded from personal liability for civil damages provided that their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Behrens v. Pelletier, 516 U.S. 299, 305 (1996); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The First Circuit utilizes a three-part test when evaluating whether an official is entitled to qualified immunity. See Estate of Bennett v. Wainwright, 548 F.3d 155, 167-68 (1st Cir. 2008); DeMayo v. Nugent, 517 F.3d 11, 17-19 (1st Cir. 2008); Buchanan v. Maine, 469 F.3d 158, 167-70 (1st Cir. 2006); Burke v. Town of Walpole, 405 F.3d 66, 76-77 (1st Cir. 2005); Limone v Condon, 372 F.3d 39, 44 (1st Cir. 2004). The test requires a determination as to: (1) "whether the

plaintiff's allegations, if true, establish a constitutional violation," (2) "whether the constitutional right at issue was clearly established at the time of the putative violation;" and (3) "whether a reasonable officer, situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right." DeMayo, 517 F.3d at 18; Burke, 405 F.3d at 77; Limone, 372 F.3d at 44. If all three inquiries are answered in the affirmative, a court denies qualified immunity.

We have concluded that Plaintiff only states actionable section 1983 claims against Co-defendants Miranda, Rodríguez, and John Doe guardsman for the alleged use of excessive force in violation of the Fourth Amendment. We, therefore, limit our analysis of qualified immunity to parts two and three of the above test and a consideration of Plaintiff's Fourth Amendment right.

Regarding part two, a citizen's Fourth Amendment right to be free from the use of excessive, unreasonable force by law enforcement officers is clearly established in case law, and even commonly understood by non-practitioners. Morelli v. Webster, 552 F.3d 12, 22 (1st Cir. 2009) ("[O]ur case law supplies a crystal clear articulation of the right, grounded in the Fourth Amendment, to be free from the use of excessive force by an arresting officer."). We, therefore, answer the second inquiry of the above three-part test in the affirmative.

Regarding part three, we would benefit from Co-defendants' impressions at the time of their intervention in deciding whether a reasonable officer, similarly situated, would have understood the alleged physical abuse to constitute a Fourth Amendment violation. Limited to Plaintiff's version of the facts, we find that any reasonable officer, and particularly officers of the PRPD and PRNG, should have known that the use force as alleged in Plaintiff's Amended Complaint would violate Plaintiff's Fourth Amendment right. At this stage in the proceedings, we find that Co-Defendants Miranda, Rodriguez, and John Doe guardsman are not entitled to qualified immunity. We may reach a different conclusion on a more developed record, however.

E. Plaintiff's Supplemental Claims

Having dismissed Plaintiff's federal-based causes of action against unknown supervisors ("Richard Roe") in both their personal and official capacities, Plaintiff's pendent claims against the same defendants are hereby **DISMISSED WITHOUT PREJUDICE**. 28 U.S.C. § 1367(c); McGee v. Delica Co., Ltd., 417 F.3d 107, 128 (1st Cir. 2005); Gonzalez v. Family Dept., 377 F.3d 81, 89 (1st Cir. 2004); 28 U.S.C. § 1367(c).

IV.

Conclusion

For the foregoing reasons, Defendants' Motion is **GRANTED in part** and **DENIED in part.** Plaintiff's Section 1983 claims brought against all known and unknown Defendants in their official capacities for alleged violations of the Fourth, Fifth, and Fourteenth Amendments of the U.S. Constitution are hereby **DISMISSED WITH PREJUDICE.** Plaintiff's Section 1983 claims brought against all known and unknown Defendants in their official and personal capacities for the alleged deprivation of due process rights guaranteed by the Fifth and Fourteenth Amendments are hereby **DISMISSED WITH PREJUDICE.** Plaintiff's Section 1983 claims against unknown supervisors ("Richard Roe") in their official and personal capacities for the alleged use of excessive force in violation of the Fourth Amendment are hereby **DISMISSED WITH PREJUDICE.** Plaintiff's Section 1983 claims against all known and unknown Defendants in their official and personal capacities for the malicious prosecution of Plaintiff in violation of the Fourth Amendment are hereby **DISMISSED WITH PREJUDICE.** Plaintiff's state law claims against unknown Defendant supervisors ("Richard Roe"), in their personal and official capacities, are **DISMISSED WITHOUT PREJUDICE.**

The remaining triable issues are: (1) Plaintiff's Section 1983 claim against Defendants Miranda, Rodríguez, and John Doe guardsman,

in their personal capacities, for alleged use of excessive force in violation of the Fourth Amendment; (2) Plaintiff's supplemental claims against the same defendants; and (3) Defendants' entitlement to qualified immunity.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 16th day of April, 2009.

s/José Antonio Fusté
JOSE ANTONIO FUSTE
Chief U.S. District Judge